APPENDIX A

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES of America and Interstate Commerce Commission, Defendants,

and

Railway Labor Executives' Association and Atlanta Employees Protective Association, Intervening Defendants.

Civ. A. No. 3761.

United States District Court
W. D. Kentucky,
at Louisville.
Aug. 5, 1965.

* * * * * * *

Before MILLER, Circuit Judge, BROOKS, District Judge, and ROY M. SHELBOURNE, Senior District Judge.

SHELBOURNE, Senior District Judge.

The Louisville and Nashville Railroad Company (L & N) filed this action seeking to annul and set aside certain portions of the reports and orders of the Interstate Commerce Commission (Commission) in a proceeding styled Louisville & Nashville Railroad Company, et al., Merger, Etc., Finance Docket No. 18,845. In that proceeding the Commission approved the merger of the property and franchises of the Nashville, Chattanooga & St. Louis Railway

(NC & StL) into L & N ownership, management and operation as provided by Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2). The part of the Commission's report and orders which the L & N attacks relates to extension of employee protective benefits under Section 5(2)(f) of the Act to the railroad employees engaged in the operation of the Atlanta Joint Terminals (AJT).

The controversy here stems from the Commission's report and order of March 1, 1957, in which the Commission indicated that the protective benefits provided for the adversely affected employees of the L & N and NC & StL would likewise extend to and cover employees of AJT, if, in fact, they were adversely affected as a result of the merger. 295 I.C.C. 457, 502.

April 8, 1957, the Atlanta Employees Protective Association, representing AJT's employees, filed with the Commission a petition for leave to intervene and sought a reconsideration of the Commission's order on the ground that the order did not adequately protect the employees of AJT. By its order dated July 10, 1957, the Commission granted the petition for leave to intervene but denied reconsideration of its previous order. The merger of the NC & StL into the L & N was effected August 31, 1957. The L & N petitioned the Commission with respect to the relief afforded the AJT employees on August 15, 1958, and its petition was rejected.

The Commission reopened the proceeding on its own motion on June 9, 1959, for the sole purpose of determining the nature and organizational character of AJT and the relationship of its employees with those of the L & N. By its report and order of October 26, 1961, following a hearing, the Commission determined on the facts before it that the employees of AJT must be regarded as being joint and common employees of the L & N and affiliated carriers,

which created shared responsibilities and expense in AJT's operation. It ordered that the AJT employees were entitled to protection under Section 5(2)(f) of the Act if their employment was adversely affected by the merger. 312 I.C.C. 676.

The complaint in this action was filed by the L & N on March 6, 1959, challenging the validity of the Commission's order of March 1, 1957, granting the protective benefits of Section 5(2)(f) to the AJT employees. The Railway Labor Executives' Association and the Atlanta Employees Protective Association were permitted to intervene as defendants on April 6, 1959. After the Commission reopened the proceedings before it, this Court suspended further action on L & N's complaint on June 30, 1959. Subsequent to the termination of the reopened proceedings before the Commission, the Court sustained L & N's motion to file an amended complaint by its order of September 11, 1963. Answers were filed by the defendants and intervening defendants, extensive briefs were submitted, and the case was argued before this Court comprised of three judges November 13, 1964.

The L & N does not dispute the facts on which the Commission based its determination that the AJT employees were the joint employees of the L & N, the Georgia Railroad (Georgia), and the Atlanta & West Point Railroad Company (A & WP). The L & N's challenge is to the conclusion from the established facts drawn by the Commission, and it claims that the Commission's decision lacks a rational foundation in law because it fails to take cognizance of the significance and meaning of the facts. It is contended that the Commission's decision regards AJT as a separate entity, a carrier, and an employer in its own right and also as a mere aggregate of the three railroads which created it, and that such treatment of the facts is an obvious logical fallacy.

The Commission rejected the L & N's argument and in its report of October 26, 1961, the Commission said:

> "Assuming, as we do, that the nature of the services performed by Terminals requires that it be considered a common carrier as that term is defined in section 1(3)(a) of the Interstate Commerce Act, this is not dispositive of the issue of the relationship of the terminal employees to Louisville. In our opinion, even if Terminals should properly be considered a carrier for purposes of regulation under the Act, we are not precluded from finding that there exists between Terminals' employees and Louisville an employee-employer relationship. Nor does the fact that Terminals has been treated as a carrier in the field of labor relations preclude such a finding. While the factors relied on by Louisville have been considered along with all of the facts and circumstances embodied in the record before us, we do not regard them as controlling."

The L & N has advanced a second somewhat similar but distinct argument. In this line of attack, L & N charges that the Commission exceeded its authority by treating AJT as a mere aggregate and creature of three railroads when Section 1(3)(a) of the Act defines "common carrier" in such terms that AJT must be considered a carrier in its own right for purposes of the Act. It is argued that the Commission disregarded the definitions prescribed by Congress for proper administration of the Act when it stated in its report of October 26, 1961, supra, that AJT must be considered a common carrier as that term is defined in the Act but that it did not regard this as dispositive of the issue or controlling. L & N contends that the Commission cannot disregard the status conferred on AJT by the Act for the purposes of Section 5(2)(f) when for "purposes of regulation" within the framework of the

Act the Commission recognizes AJT as a carrier in its own right. It is claimed that the Commission's determination is not only an arbitrary exercise of its administrative function but is also beyond the Commission's statutory authority.

In reply to the arguments advanced by the L & N, the Commission contends that AJT's status as a legal entity, employer or carrier is irrelevant because the existence of an employee-employer relationship between the employees at AJT and the L & N is a question of fact. Walling v. Western Weighing & Inspection Bureau, 7 Cir., 160 F. 2d 47, 48 (1946). Since the issue is purely factual, the Commission maintains that the Act permits a determination in a proper case that the employees of one carrier are also the employees of another carrier for the purposes of Section 5(2)(f). Railway Labor Executives' Association v. United States, D.C., Va., 216 F. Supp. 101 (1963). The Commission asserts that this is a proper case for such a determination, as a finding that employees at AJT are joint employees of the L & N and its affiliated carriers is supported by substantial evidence.

The L & N argues in rebuttal that this is not a proper case for such a determination because there is no evidence to support a finding that AJT as a carrier and L & N as a carrier jointly employ AJT's employees. It is contended that the finding actually made by the Commission that AJT personnel is jointly employed by L & N, Georgia, and A & WP is legally unsound because such a determination disregards AJT's status as a carrier.

The L & N insists that under the opinions in such cases as United States v. Brooklyn Eastern Dist. Terminal, 249 U. S. 296, 39 S. Ct. 283, 63 L. Ed. 613 (1919); United States v. State of California, 297 U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936); Union Stock Yard & Transit Co. v. United States, 308 U. S. 213, 60 S. Ct. 193, 84 L. Ed. 198

(1939), and United States v. Atlanta Terminal Co., 5 Cir., 260 F. 779 (1919), the corporate character of AJT with respect to its employees being within the ambit for protection under Section 5(2)(f) depends not upon whether it is incorporated or unincorporated but depends upon *what it does.*

The plan and practice for operation of AJT has been: Atlanta Joint Terminals is unincorporated and in the written agreement executed April 1, 1907, between L & N and Atlantic Coast Line, lessees of the Georgia Railroad, first parties; Atlanta & West Point Railroad Company, for itself and as lessee of the Atlanta Belt Railroad, second party, and L & N, third party, is referred to as "an arrangement for the common use of terminals and not a partnership between the parties hereto." The duration of the "arrangement" was for the term of a lease to Georgia Railroad and its lessees, L & N and Atlantic Coast Line, which will expire April 1, 1980.

Each of the parties conveyed its ownership and leasehold property rights in the trackage, buildings, terminal facilities, and appurtenances in the area of the terminal. Rental for the terminal equivalent to five per cent interest on the agreed valuation for the properties of Georgia was provided. Reimbursement for investments and expenditures by the other participants in the proposed operation was to be prorated according to the ratio of the cars, engines and cabooses of each carrier entering and leaving the terminal properties to the total number of cars, engines and cabooses of all the carriers. Provision was made for proration for payment of state, county and municipal taxes and for the cost of maintenance and operation of the properties and supervision of the terminal.

The necessary switch engines were furnished by the parties based upon estimates of the work requirements of each participant. Provision was made for the creation of

funds with which to pay locomotive and car repairs and supplies.

The general supervision of the terminal property was vested in a board of control comprised of the persons holding the position of general manager with the parties to the agreement. The board made the rules for the government of employees and operation of the terminal, and appointed a superintendent of terminals who had charge of the properties and operation as a joint officer and to whom all officers, agents and employees reported. The superintendent of terminals appointed a joint local agent to be in charge of the freight houses, transfer platforms and team delivery tracks. With the approval of the board of control, he appointed a mechanical foreman to supervise the operation of shop and roundhouse facilities.

In addition to performing all auditing functions of the terminal, Georgia rendered and paid bills to other railroads and industries in connection with local switching, handled claims for personal injuries and loss and damages to freight, and had charge of admission of other carriers to use of the terminal. Georgia maintained the bank checking accounts of the terminal in the names of Georgia's lessees and issued the terminal pay checks and drafts in payment of claims allowed for injuries to employees of the terminal.

The chairman of AJT's board of control is the general manager of the Georgia appointed by Georgia's executive committee, who were and are the presidents of the L & N and Atlantic Coast Line. The chairman also serves as president and general manager of A & WP and Western Railway of Alabama and is the chief executive officer of those railroads and AJT.

AJT for years has been subject to the hours of service law as a common carrier. Its employees were represented by unions separate and distinct from those representing employees of the L & N, and since 1937 the National Me-

diation Board has certified such representatives of AJT's employees as provided by the Railway Labor Act, 45 U.S.C. § 152, Ninth. The AJT employees have a union shop agreement and L & N employees do not. All of the terminal employees' bargaining agreements are conducted and made with AJT and disputes and claims arising from such agreements have been taken to the National Railroad Adjustment Board. The L & N has participated in none of such agreements, negotiations or proceedings. The employees of AJT and the employees of L & N have no employment or seniority rights either in the other.

The plan and practice in the operation of AJT has been as set out above since its organization.

All of these facts were recognized by the Commission in its decision in this case admitting that AJT is a separate, unincorporated association and is a common carrier. Yet, the Commission concluded that AJT employees were entitled to protection as required by Section 5 (2) (f) as employees of L & N if, in fact, their employment was adversely affected as a result of or in anticipation of the merger.

In the case of Railway Labor Executives' Association v. United States, D.C. Va., 216 F. Supp. 101 (1963), employees of the Chesapeake & Ohio Railway Company at the Main Street station in Richmond, Virginia, sought to annul and vacate certain orders of the Commission denying them the protective benefits provided under Section 5(2) (f) of the statute. The Main Street station had been built and occupied since 1901 in a joint operation by the C & O and the Seaboard Air Line Railroad. Up to 1959, the terminal was operated by employees of the C & O under a contractual arrangement with Seaboard involving an apportionment and reimbursement of its proportionate cost of the operation

by Seaboard. In 1959, the Commission granted Seaboard authority to acquire joint control and use of the Broad Street station and following the acquisition Seaboard abandoned any use of the Main Street station. Seaboard's withdrawal decreased the number of C & O employees needed to operate that terminal. The employees who were furloughed or laid off because of the reduction brought suit charging that they were railroad employees affected by the Commission's order granting Seaboard authority to acquire the Broad Street station and that their employment was not protected in the order as required by the Act.

The Commission's action in denying C & O's furloughed employees protection under Section 5(2) (f) was upon the basis that C & O was not a party to or involved in the proceeding before the Commission by which Seaboard obtained authority to acquire the Broad Street station. The Commission conceded in its reports and orders that the plaintiffs were railroad employees affected by the transaction but held they were not employees affected within the purview of Section 5(2) (f) of the Act. The court held that the interrelation between Seaboard and C & O at the Main Street station was such as to give the plaintiff employees a right to the relief they sought. The orders of the Commission were vacated by the Court with instructions that the plaintiff employees be treated as coming within the ambit of Section 5(2) (f).

The case of Railway Labor Executives' Association v. United States, D. C. Va., 226 F. Supp. 521 (1964), arose out of the Commission's approval of the acquisition of stock control of the Central of Georgia Railroad Company by Southern Railway. When it approved the transaction the Commission had full knowledge that Southern proposed to consolidate Central's freight agencies, yards, shops and accounting department into those of Southern which would, and did, result in job losses and hardships to many em-

ployees. In recognition of such hardships and losses, the Commission imposed conditions for the protection of the employees affected by the transaction which it determined met the requirements of Section 5(2) (f) of the Act and provided fair and equitable treatment of all employees coming under the protective aegis of the statute. In describing the duty of the Commission under Section 5(2) (f) at page 523 of its opinion, the court said:

> "The Commission is free in its discretion to make different findings, to reach different conclusions, and to impose different conditions *predicated upon its evaluation of the facts of record relating to each individual transaction*, so long as it does not fail to meet the minimum statutory criteria and is fair and equitable." (Emphasis added.)

It was decided in that case that the Commission's order had provided proper measures of protection for the employees of Central affected by the transaction which resulted in hardships and job losses.

In his opinion in Brotherhood of Maintenance of Way Employees v. United States, D. C. Mich., 221 F. Supp. 19, 30 (1963), Judge O'Sullivan said:

> "In all events, it is not our function to substitute our judgment for that of the Commission. Minneapolis & St. Louis R. Co. v. United States, 361 U. S. 173, 188, 80 S. Ct. 229, 4 L. Ed. 2d 223. The Commission's wisdom and experience, not ours, must determine whether its approval of the C&O—B&O affiliation is consistent with the public interest. McLean Trucking Co. v. United States, 321 U. S. 67, 87, 64 S. Ct. 370, 88 L. Ed. 544."

In considering the respect that courts should manifest for the wisdom and experience of the Interstate Commerce

Commission in Minneapolis & St. Louis R. Co. v. United States, 361 U. S. 173, 187, 188, 80 S. Ct. 229, 238, 4 L. Ed. 2d 223, the Supreme Court said:

> "Resolution of the conflicting considerations 'is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission "to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms." 79 Cong. Rec. 12207. "The wisdom and experience of that commission," not of the courts, must determine whether the proposed [acquisition] is "consistent with the public interest." ' " (Citing cases.)

The above statement was made by the Supreme Court as to the significance and purpose of the statute here in question although not involving the identical issue. The Supreme Court said that the wisdom and experience of the Commission, not of the courts, must determine questions arising under Section 5(2) of the Act, 49 U.S.C. § 5(2).

In this case, we are not convinced that the Commission committed an error of law or that its action was arbitrary, capricious or an abuse of discretion. In our opinion, its findings of fact are supported by substantial evidence. We, therefore, are not authorized to disturb the conclusions of this experienced agency of the Government charged with manifold duties in the field of transportation, no small part of which is in the area of mergers and affiliations in an effort to "slow down and arrest the economic deterioration of the American railroads."

The complaint in this action should be dismissed and a judgment so providing will be entered.

Appendix A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3761

Louisville and Nashville Railroad Company, - - Plaintiff,

v.

United States of America and
Interstate Commerce Commission, - - Defendants,
and
Railway Labor Executives' Association and
Atlanta Employees Protective Association, - - Intervening Defendants.

ORDER.

On August 13, 1965, the plaintiff, Louisville and Nashville Railroad Company, filed its motion to set aside the judgment entered by the Clerk of this Court on August 9, 1965, so that the Court may clarify and correct its opinion filed August 5, 1965. Plaintiff moves to clarify and correct the following portions of said opinion:

(a) "The controversy here stems from the Commission's report and order of March 1, 1957, in which the Commission indicated that the protective benefits provided for adversely affected employees of the L & N and NC & StL would likewise extend to and cover employees of AJT. 295 I.C.C. 457, 502." (Page 1.)

(b) "It ordered that the AJT employees were entitled to protection under Section 5(2) (f) of the Act, as their employment was adversely affected by the merger. 312 I.C.C. 676." (Page 2.)

(c) "All of these facts were recognized by the Commission in its decision in this case admitting that AJT is a separate, unincorporated association and is a common carrier. Yet, the Commission concluded that the merger of the NC & St L with L & N constituted a transaction which affected employees of AJT as employees of L & N and provided for their protection as required by Section 5(2) (f)." (Page 7.)

(d) "The vice president and general manager of L & N is the general manager of the terminal." (Page 7.)

August 30, 1965, counsel for the defendants, United States of America and Interstate Commerce Commission, filed a reply opposing plaintiff's motion. The Court has considered the defendants' objections and overrules said objections.

IT IS ORDERED that the judgment heretofore entered on August 9, 1965, be and hereby is set aside so that the Court's opinion dated August 5, 1965, may be amended in the following respects:

(a) Paragraph 2 on page 1 is amended to read:

"The controversy here stems from the Commission's report and order of March 1, 1957, in which the Commission indicated that the protective benefits provided for the adversely affected employees of the L & N and NC & StL would likewise extend to and cover employees of AJT, if, in fact, they were adversely affected as a result of the merger. 295 I.C.C. 457, 502."

Appendix A

(b) The last sentence of paragraph 2 on page 2 is amended to read:

> "It ordered that the AJT employees were entitled to protection under Section 5(2)(f) of the Act if their employment was adversely affected by the merger. 312 I.C.C. 676."

(c) Paragraph 1 on page 7 is amended by deleting the last sentence.

(d) Paragraph 4 on page 7 is amended to read:

> "All of these facts were recognized by the Commission in its decision in this case admitting that AJT is a separate, unincorporated association and is a common carrier. Yet, the Commission concluded that AJT employees were entitled to protection as required by Section 5(2)(f) as employees of L & N if, in fact, their employment was adversely affected as a result of or in anticipation of the merger."

A judgment will be entered dismissing the complaint.

August 31, 1965

(s) Shackelford Miller, Jr.,
Judge, U. S. Court of Appeals

(s) Henry L. Brooks,
Judge, U. S. District Court

(s) Roy M. Shelbourne,
Senior Judge, U. S. District Court
Sitting by Designation

A Copy: Attest
Martin R. Glenn, Clerk
By (s) F. Allen,
Deputy Clerk.

Appendix A

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H. G. Breetz,
Louisville and Nashville Railroad Company,
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Appendix A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

Civil Action No. 3761

Louisville and Nashville Railroad Company, - Plaintiff,

v.

United States of America and
Interstate Commerce Commission, - - - Defendants,
and
Railway Labor Executives' Association and
Atlanta Employees Protective Association, - Intervening Defendants.

JUDGMENT—Entered September 1, 1965.

This action came on for hearing before the Court (Honorable Shackelford Miller, Jr., United States Court of Appeals Judge, Honorable Henry L. Brooks, United States District Judge, and Honorable Roy M. Shelbourne, Senior District Judge Sitting by Designation) and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the complaint in this action be dismissed, and that the defendants, United States of America and Interstate Commerce Commission, and the intervening defendants, Railway Labor Executives' Association and Atlanta Employees Protective Association, recover of the plaintiff, Louisville and Nashville Railroad Company, their taxable costs of the action.

Appendix A

Dated at Louisville, Kentucky, this 1st day of September, 1965.

(s) Martin R. Glenn,
Clerk of Court.

cc:—Mr. Joseph L. Lenihan,
Mr. H. G. Breetz,
908 West Broadway,
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—Mr. Ernest W. Rivers,
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—Mr. Leonard S. Goodman,
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—Mr. John W. Chambers,
Citizens & Southern National Bank Bldg.,
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Appendix A

FINANCE DOCKET No. 18845

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., MERGER, ETC.

Decided October 26, 1961

Upon further hearing found:

1. The Atlanta Joint Terminals is an unincorporated terminal service agency created by the Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company jointly, as lessees of the Georgia Railroad; the Atlanta & West Point Railroad Company; and the Louisville and Nashville Railroad Company in its individual interest, under terms of an agreement dated April 1, 1907, covering joint use and operation of terminal properties and facilities in Atlanta, Ga.
2. Employees of Atlanta Joint Terminals are joint, or common, employees of the aforesaid railroad carriers under the terms of the said agreement of April 1, 1907.
3. Report and order herein dated March 1, 1957, modified by incorporating therein by reference the facts, conclusions, and findings contained in the report and order on further hearing with respect to the status of Atlanta Joint Terminals and the employees thereof, and protection of employees affected as an incident to approval of the merger, et cetera, of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company, et al. Prior report 295 I.C.C. 457.

Appearances as in prior report and, in addition:

H. G. Breetz and *C. D. Temple* for applicants.

John W. Chambers and *Terry P. McKenna* for employees protective association, intervener.

Appendix A

REPORT OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

Exceptions to the report recommended by the hearing examiner were filed by the Louisville and Nashville Railroad Company (Louisville & Nashville) and the Railway Labor Executives' Association (the association). The association and the Atlanta Employees Protective Association replied to the Louisville & Nashville's exceptions and the Louisville & Nashville replied to the association's exceptions. The case has been argued orally.

By report and order in this proceeding, dated March 1, 1957, 295 I.C.C. 457, we authorized, among other things, the merger of the properties and franchises of The Nashville, Chattanooga & St. Louis Railway (Chattanooga) into the Louisville & Nashville for ownership, management, and operation, and indirect control by the Atlantic Coast Line Railroad Company (Coast Line) of the surviving corporation through ownership of capital stock. We prescribed the same conditions as were imposed in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, for the protection of railway employees who would be adversely affected by the transaction. As the result of contentions by the association, first introduced at oral argument, we held that employees of the Atlanta Joint Terminals (Terminals) would be protected by the employee conditions but that such conditions would not be retroactive.

Following the denial of a petition for reconsideration filed by Terminals' employees, the overruling of a motion for leave to file a petition for leave to intervene filed by the Louisville & Nashville, and the institution, by the latter, of litigation in the United States District Court,[1] on our own motion we reopened the proceeding by order dated

[1]Western District of Kentucky, civil action No. 3761.

June 9, 1959, for further hearing. The sole purpose of further hearing was to determine the nature and organizational character of Terminals, the relationship of it and its employees, if any, to the Louisville & Nashville, and the extent to which, if any, our report and order herein of March 1, 1957, should be modified insofar as the protective conditions prescribed therein were made applicable to the employees of Terminals. Further hearing was held at which the parties denoted their understanding, in compliance with our directive, that the questions to be determined would not require evidence of whether the employees of Terminals have been or would be adversely affected as a result of the approved merger. The parties agreed that, pursuant to a statement contained in our prior report, if it should be found that our jurisdiction extends to providing protection to the employees of Terminals, proof of the effect upon any particular employee or group of employees would be resolved by following the arbitration procedures provided in condition No. 8 prescribed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, which are incorporated in the *New Orleans Union Passenger Terminal Case* conditions. The protection sought on behalf of the employees of Terminals would be fully provided without modification of the conditions specified in our report of March 1, 1957, if, upon the further record, it is established that the employees of Terminals occupy status as employees of the carriers involved in the merger.

Terminals was created under the terms of an agreement executed April 1, 1907, but made effective from July 1, 1904, as a joint railroad terminal to be used and operated in common by the parties to the agreement. It is not a corporation and is described in the agreement as "an arrangement for the common use of terminals and not a partnership between the parties hereto." The parties to the agreement are the Louisville & Nashville and the Coast Line,

lessees of the Georgia Railroad,[2] first parties; the Atlanta & West Point Railroad Company (West Point) for itself and as lessee of the Atlanta Belt Railroad, second party; and the Louisville & Nashville, third party. The agreement is to remain effective during the entire remaining term of a lease dated May 7, 1881, with expiration date of April 1, 1980, between the Georgia Railroad & Banking Company and one William M. Wadley (expires April 1, 1980), which lease had been assigned to the Louisville & Nashville and the Coast Line. Unless otherwise stated, the term "the Georgia," as used hereinafter, denotes the Georgia Railroad and the Louisville & Nashville and the Coast Line as its joint lessees.

To accomplish the purpose of combining their respective terminal facilities and operations at Atlanta, each party to the agreement grants or conveys to Terminals its entire ownership and leasehold property rights, titles, and interests in existing and proposed trackage, buildings, switches, turnouts and other improvements, and freight warehouses, real estate, and appurtenant terminal facilities. The trackage involved totals 32.77 miles, extending from Central Avenue eastward 2.24 miles to about Hurt Street and to the yard limit board south of Wylie Street on the West Point's freight main line. In addition, Terminals has trackage rights over and performs terminal services over the Georgia's Clifton main line extending about 2 miles east of Hurt Street; over tracks of West Point to Allene Avenue; and over the Louisville & Nashville's belt line extending to the Hills Park yard of the Chattanooga.

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[2]The Georgia Railroad is an unincorporated lessee organization in which name, and through which is maintained and operated the railway properties of the Georgia Railroad & Banking Company. In addition to their joint control of the Georgia, the Louisville & Nashville and the Coast Line jointly control the West Point through ownership of stock and the Coast Line controls the Louisville & Nashville through stock ownership.

Appendix A

Rental for the terminal, equivalent to 5 percent interest on the agreed valuation of the properties of the Georgia, and expenditures of the Louisville & Nashville for certain new construction to have been completed about July 1, 1907, and reimbursement of investments and expenditures by the other parties, are prorated according to the ratio of the cars, engines, and cabooses of each carrier leaving and entering the terminal properties, to the total number of cars, engines, and cabooses of all the carriers. Appropriate similar methods of proration are provided for the payment of State, county, and municipal taxes; the cost of maintenance of jointly used property and all its improvements; the aggregate wages of the superintendent of terminals, his office force, and all other employees engaged in yard service; and the expenses of shifting of cars, marshalling and distributing of trains, and switching within the yard limits, including fuel, water, and supplies for, and ordinary running repairs to, switch engines. The required number of switch engines are furnished jointly by the parties to the agreement based upon quotas related to the relative proportions of the work performed for each of the parties. The aggregate wages of shop and roundhouse employees and all other expenses incident to the care of locomotives are computed monthly; the expenses connected with the care of switching locomotives are divided among the parties on the same basis that switch engines are agreed to be furnished by the parties; and the expenses connected with road service locomotives are divided among the parties in the same proportion that the number of such locomotives of the respective parties bears to the whole number of road locomotives cared for at the roundhouse. Other formulas, based upon the cost of providing the service plus 10 percent, are prescribed for the payment of repairs to road service locomotives and to cars, and other provisions relate to the supply of, and payment for, fuel,

water, and oil. Agency expenses in offices, freight houses, and transfer platforms for salaries, light, heat, water, and supplies are divided among the parties in the same proportion that the tonnage of freight of each party billed locally to and from Atlanta bears to the whole freight tonnage so billed at the aforesaid agency.

Under the terms of the agreement, general supervision of the terminal property is lodged with a board of control composed of the general managers of the parties to the agreement. The board of control formulates and adopts rules for the government of employees and for operation of the terminal, and appoints a superintendent of terminals who has immediate charge of the terminal yards as a joint officer and to whom all officers, agents, and employees of the joint terminals report. The superintendent of terminals appoints a joint local agent to be in charge of the freight houses, transfer platforms, and team delivery tracks; and, with the approval of the board of control, the superintendent of terminals appoints a mechanical foreman to supervise the operation of the shop and roundhouse and adjunct facilities. All accounting functions of the terminal, under the provisions of the agreement, are performed by the Georgia's accounting department for which the Georgia receives reasonable compensation as may be determined from time to time by the board of control. Additional provisions pertain to such matters as the rendering and payment of monthly bills; local switching to and from other railroads and to and from industries in and near Atlanta; the handling of claims for personal injuries, damage to equipment, and loss and damage to freight, reference being made to the terminal employees as joint or common employees; settlement of disputes as to operation of the terminals or construction of the agreement; and periodic revision of rental and valuation factors. Amendments to the agreement dated April 1, 1907, March 13, 1917, and May 6,

1947, modified certain provisions of the basic agreement in respects not here material.

Although the Louisville & Nashville voluntarily ceased using the terminal facilities for yard operations at Atlanta during November 1955, and, as a consequence Terminals discontinued operations under trackage rights over the Louisville & Nashville's belt line to and from the yard of the Chattanooga,[3] and lost about one-third of its usual volume of business, such changes have not resulted in cancellation or modification of the 1907 agreement as amended.

As noted, the board of control of Terminals is comprised of the general managers of the Georgia, the West Point, and the Louisville & Nashville. The general manager of the Georgia is appointed by the Georgia's executive committee, comprised of the presidents of the Louisville & Nashville and the Coast Line and the chief executive officer of the Georgia. The present general manager of the Georgia is also its chief executive officer, as well as general manager and chief executive officer of the West Point and of the Western Railway of Alabama (the Alabama). In addition, he serves as chairman of the board of control of Terminals and chief executive officer of the terminal. Such officers of Terminals as the superintendent of terminals (title changed to "terminal trainmaster" in November 1955), joint freight agent, and mechanical foreman have practically always been appointed from the ranks of Terminals or the Georgia. There is also an officer who serves as director of personnel of the Georgia, the West Point, the Alabama, and Terminals. All of these officers report to the chairman of the board of control and he, in turn, reports to the board. There have been no changes in the member-

[3]The reciting herein of the change in service in no manner constitutes an expression that such abandonment of operation requires the issuance of a certificate of public convenience and necessity under section 1(18)-(22).

ship of Terminals' board of control as a consequence of the merger of the Louisville & Nashville and the Chattanooga.

The work of the terminal is performed by employees each of whom has seniority on Terminals' individual rosters. These employees have no seniority or employment rights on the lines of the Louisville & Nashville or of the other tenants, and persons employed for work on the lines of the Louisville & Nashville or the other tenants have no employment rights in Terminals' territory. On occasions when emergencies have required Terminals' employees to perform services outside the terminal limits on lines other than those of Terminals the work has been treated as on a foreign line and extra wages have been paid.

Applications for employment at Terminals are approved by the director of personnel. He negotiates labor agreements and handles grievances respecting all crafts and class of employees, and his name is certified to the National Railroad Adjustment Board as the highest operating officer handling labor matters pertaining to the terminal. He also performs the same functions for the Georgia, the West Point, and the Alabama. Applicants for employment at the terminal execute an application form which shows the names of the West Point, the Alabama, the Georgia, and Terminals in its caption. The labor agreements usually are in the name of Terminals individually or show the names of the West Point, the Alabama, and the Georgia together with that of Terminals. A representative agreement provides that seniority of the employees is confined to seniority districts coinciding with the railroad property upon which employed. An earlier agreement covering yardmen at the terminal shows the names of the West Point, the Louisville & Nashville, and the Georgia, along with that of Terminals.

Appendix A

Following settlement of a dispute before the National Mediation Board, Terminals applied to become a party to the Washington Job Protection Agreement of May 1936. The application was accepted and acted upon in Terminals' individual name and capacity, and when approved effective November 1, 1941, Terminals became a "single carrier party" listed in the southeastern territory. The Coast Line and the Louisville & Nashville were admitted as parties to the agreement on July 8, 1939, and February 10, 1942, respectively. The "Atlanta & West Point R.R. Co.—Western Ry. of Alabama," and the "Georgia Railroad" were admitted as parties to the agreement on July 17, 1944.

Under the joint accounting arrangements, the Georgia maintains the bank checking accounts of the terminal in the name of the lessee organization of the Georgia, and issues Terminals' paychecks and drafts and checks in payment for claims allowed for injuries suffered by the employees of the terminal. Terminals files no separate annual reports with the Commission or other State and Federal agencies. Data required on its accounts are embraced in the annual reports filed with this Commission by the Georgia. Terminals' property tax returns in Georgia are made in the name of Georgia Railroad & Banking Company, and some nonoperating property tax returns are made in the name of the Georgia.

Employees at the terminal are covered by group medical insurance under a master policy issued by the insurance company to the Louisville & Nashville. Various decided and pending litigations in law and equity brought in county and other courts in Georgia by or against the terminal have been filed in the name of Coast Line and the Louisville & Nashville as lessees of the Georgia Railroad & Banking Company; the West Point; and the Louisville & Nashville, "all operating yards and terminal facilities at Atlanta under the name and style of Atlanta Joint Terminals," or "doing

business as Atlanta Joint Terminals" as parties plaintiff or parties defendant. Federal income tax deductions withheld on behalf of terminal employees are reported in the name of "Georgia Railroad Lessee Organization" without reference to Terminals.

The examiner found, upon further hearing, that because the entire board of control of the terminal is composed of representatives of the management of Georgia Railroad's lessee organization, the West Point, and the Louisville & Nashville, the facts demonstrate that the Louisville & Nashville and carriers affiliated with it control or manage, or have the power to exercise control or management of, Terminals, a fact which is not altered by the circumstance that the control lies partly with other carriers of the Louisville & Nashville-Coast Line system; that employer obligations to provide compensation, job security, and related benefits to Terminals' employees rests upon the controlling carriers; and, to the extent that the Louisville & Nashville, in direct relation to the services provided it by Terminals, proportionately shares in the meeting of the net operating expenses of Terminals, the employees involved are identifiable as employees of the Louisville & Nashville. He found that the same situation pertains to the other carriers and carrier interests involved in the terminal arrangement. On the basis thereof, he concluded that the conditions provided to protect railroad employees of the Louisville & Nashville and the Chattanooga who might be in a worse position with respect to their employment as a consequence of the merger approved in this proceeding, necessarily applies to the employees of Terminals.

The Louisville & Nashville excepts to the hearing examiner's conclusion that Terminals' employees are entitled to the benefits of the protective conditions imposed by our report and order of March 1, 1957. The Railway Labor Executives' Association did not except to the findings and

conclusions in the recommended report. Its exceptions were filed for the purpose of preserving arguments which the hearing examiner rejected or found unnecessary to consider.

In essence, it is the position of the Louisville & Nashville that the examiner erred in not finding (1) that Terminals is a common carrier separate and distinct from the Louisville & Nashville and from the other parties to the agreement setting up the terminal, and (2) that since Terminals was not an applicant or participant in the Louisville & Nashville-Chattanooga merger transaction, we are without authority to impose protective conditions for the benefit of Terminals' employees. Specifically, the Louisville & Nashville contends that Terminals is a separate common carrier by railroad by virtue of its performance of terminal services at Atlanta (citing *Union Stock Yards Co.* v. *United States,* 308 U. S. 213; *United States* v. *California,* 297 U. S. 175; *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296; *Status of Allegheny & S. S. Ry. Co.,* 277 I.C.C. 119; *New Orleans Passenger Terminal Case,* 267 I.C.C. 763; and *Operation Over Tracks of Port Term. R. Assn.* 150 I.C.C. 402), and that Terminals has been regarded as a separate carrier in the field of labor relations. The Louisville & Nashville asserts that the examiner failed to accord due weight to such matters as that Terminals became a party to the Washington Job Protection Agreement in 1941, while the Louisville & Nashville, the Georgia, and the West Point did not do so until later dates; that Terminals' employees have a union shop agreement while persons employed on the lines of the Louisville & Nashville do not; that Terminals' employees have no employment rights on the lines of the Louisville & Nashville and persons employed on the lines of the Louisville & Nashville have no employment rights within the terminal; and that certain terminal employees have received extra pay for work on

foreign lines when they have performed work outside of the terminal limits on lines of other carriers, including the Louisville & Nashville.

Assuming, as we do, that the nature of the services performed by Terminals requires that it be considered a common carrier as that term is defined in section 1(3)(a) of the Interstate Commerce Act, this is not dispositive of the issue of the relationship of the terminal employees to the Louisville & Nashville. In our opinion, even if Terminals should properly be considered a carrier for purposes of regulation under the act, we are not precluded from finding that there exists between Terminals' employees and the Louisville & Nashville an employee-employer relationship. Nor does the fact that Terminals has been treated as a carrier in the field of labor relations preclude such a finding. While the factors relied on by the Louisville & Nashville have been considered along with all of the facts and circumstances embodied in the record before us, we do not regard them as controlling.

In summary, Terminals is an unincorporated terminal service agency created by the Louisville & Nashville and its affiliated carriers to be used and operated in common by them. Its operations are controlled directly by management representatives of the carriers which formed it, and those carriers share the costs of its operation on a pro rata basis. The fiscal activities and the maintenance of accounting records with respect to the terminal's revenues and expenses and their apportionment among the constituent carriers, and the filing of periodic reports and returns to Federal and State tax and regulatory agencies are performed by the accounting department of the Georgia. No property tax returns, withholding statements for income tax purposes, or Federal or State income tax returns are filed in the name of Terminals. It has no bank accounts.

Payments to Terminals' employees for wages and for settlement of claims arising from injuries are paid by checks or drafts drawn against the bank accounts of the Georgia, and, in turn, are charged against the terminal operation. Additionally, Terminals' employees are referred to as joint or common employees in the agreement of 1907, and court actions by or against Terminals specifically designate jointly the carriers who are parties to the agreement.

In our view, Atlanta Joint Terminals is not a business organization independent of the railroads which created, operate, and control it as their joint agency. Their continuing control, and power to exercise control and management, of the terminal's organization and operations obviously includes ultimate control over the employees of the terminal. Likewise, the employer obligations to provide compensation, job security, and related benefits rest upon the controlling carriers.

We have consistently interpreted section 5(2)(f) of the Interstate Commerce Act as not requiring us to impose protective conditions for the benefit of employees who cannot, in the circumstances of a particular case, be regarded as employees of a carrier which is an applicant or participant in a transaction before us for approval. See *Baltimore & O. R. Co. Operation*, 261 I.C.C. 615; Finance Docket No. 18534, *Spartanburg Terminal Co. Construction*, 295 I.C.C. 806 (not printed in full) decided July 10, 1957. However, under the facts of record in the present proceeding, the employees of Terminals must be regarded as being, in reality, joint or common employees of the Louisville & Nashville and its affiliated carriers, the Georgia and the West Point, with which it created and bears ultimate responsibility for the operation of the terminal. Because of the described employe-employer relationship, the terminal employees are entitled to the benefit of employee protective

conditions. Cf. *Gulf, M. & O. R. Co. Abandonment*, 282 I.C.C. 311.

We conclude that to the extent, if any, that the terminal employees are adversely affected in their employment by the merger of the Louisville & Nashville and the Chattanooga, they are entitled to the benefit of the employee protective conditions imposed by us in our prior report and order. Questions as to whether, when, and to what extent the terminal employees, or any of them, have been affected as a result of, or in anticipation of, the merger, are not before us; and any dispute as to such matters is to be resolved under the arbitration procedures provided in the prescribed conditions.

An appropirate order will be entered.

VICE CHAIRMAN MURPHY and COMMISSIONERS HERRING, BUSH, and TUCKER did not participate in the disposition of this proceeding.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 26th day of October, A.D. 1961.

Finance Docket No. 18845

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., MERGER, ETC.

Further investigation of the matters and things involved in this proceeding having been made, further hearing having been held, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the hearing examiner's report on further hearing, are hereby referred to and made a part hereof:

Appendix A

It is ordered, That the report of the Commission in this proceeding, dated March 1, 1957 (295 I.C.C. 457), be, and it is hereby, modified by incorporating therein by reference the facts, conclusions, and findings contained in the aforesaid report of the Commission on further hearing in respect of the status of Atlanta Joint Terminals and the employees thereof, and protection of employees affected as an incident to approval of the merger, etc., of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company, et al.; and

It is further ordered, That, except as herein modified, the said report and order of March 1, 1957, shall remain in full force and effect.

By the Commission.

Harold D. McCoy
Secretary

(SEAL)